IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-465

NAVARRO SAVINGS ASSOCIATION,

Petitioner,

v.

LAWRENCE F. LEE, JR., BERT A. BETTS, ROBERT M. GREEN, WILLIAM A. LANE, JR., JAMES B. McINTOSH, FREDERICK H. SCHROEDER, JOHN W. YORK and JACK H. QUARITIUS,

Respondents.

PETITIONER'S BRIEF ON THE MERITS

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REFERENCE TO PRIOR DECISIONS

The opinion of the District Court of the United States for the Northern District of Texas, William M. Taylor, Judge Presiding in Cause No. 3-74-1231-C entitled "Lawrence F. Lee, Jr., et al. v. Navarro Savings Association" is found at 416 F. Supp. 1186 (N.D. Tex. 1976).

The opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 76-3550, likewise

entitled, is reported at 597 F.2d 421 (5th Cir. 1979).

As required by Supreme Court Rule 23(i), copies of the opinions of the Courts below have been appended to the Petitioner's Petition for Certiorari, and such opinions are not again reproduced in the Appendix.

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction of this cause as shown by the following:

1. The judgment of the United States Court of Appeals for the Fifth Circuit as to which review is sought is dated and was entered of record on June 18; 1979.

2. The Suggestion for Rehearing En Banc filed by Petitioner (Appellee in the Court below) was denied August 1, 1979. By order entered August 15, 1979, the Court of Appeals stayed the issuance of its mandate pending Petition for Writ of Certiorari to this Court through and including September 16, 1979; and by subsequent order extended to September 21, 1979.

3. The Supreme Court of the United States granted the Writ of Certiorari pursuant to 28 U.S.C. §1254(1), by order dated November 26, 1979.

STATUTORY PROVISIONS CONSTRUED

The case involves construction of the provisions of 28 U.S.C. §1332(a) which provide as follows:

> §1332. Diversity of citizenship; amount in controversy; costs.

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between–
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

ISSUE PRESENTED FOR REVIEW

Whether for purposes of the diversity jurisdiction of the District Courts of the United States, the citizenship of a real estate investment trust should be determined with reference to the citizenship of its trustees rather than that of its beneficial shareholders by application of "real party in interest" rules or for any other reason.

STATEMENT OF THE CASE

A. Procedural Background

This case was originally brought in the State District Court of Texas, 116th Judicial District sitting at Dallas County, Texas in March, 1974 by Lawrence F. Lee, Jr., Bert A. Betts, Robert M. Green, William A. Lane, Jr., James B. McIntosh, Frederick H. Schroeder, John W.

York and Jack H. Quaritius, each of whom are Trustees of Fidelity Mortgage Investors, a real estate investment trust, with its principal offices at Jacksonville, Florida, against the Petitioner, Navarro Savings Association, as Defendant.[1] The substantive cause of action was for Navarro's alleged fraud and breach of contract in the issuance and dishonor of a loan commitment letter by Navarro, a corporate citizen of Corsicana, Navarro County, Texas.

Following evidentiary proceedings and the resulting transfer of the case to the State District Court at Navarro County, Texas, the Trustees dismissed the State action and refiled in the United States District Court for the Northern District of Texas. The Plaintiff-Trustees brought the action in their capacity as Trustees only and asserted the existence of federal diversity jurisdiction.

Upon Navarro's motion, the question of lack of complete diversity was raised; and the District Court thereupon granted leave to the Trustees to amend their complaint. Although the Amended Complaint alleged three additional grounds of jurisdiction as alternatives to diversity, the District Court dismissed the Amended Complaint, concluding that the Trustees had failed to sustain their burden of establishing jurisdiction. Specifically, by his memorandum opinion and order, the Court below determined that diversity jurisdiction did not exist in that the residence of the shareholders of FMI—as opposed to that of the Trustees only—was

[1]For clarity, reference to the Petitioner will be made by the name of "Navarro" and reference to the Respondents will be by the name of "Trustees." Reference to Fidelity Mortgage Investors as an entity will be as "FMI."

controlling. The District Court further determined that the Trustees had failed to establish any of the other alleged bases for federal jurisdiction.[2]

On appeal to the United States Court of Appeals for the Fifth Circuit, the Trustees emphasized, as they did in the District Court, the question of diversity jurisdiction. The Court of Appeals reversed, by a 2-1 majority, holding that the Trustees were "the real parties in interest" and, their citizenship being completely diverse to that of Navarro, jurisdiction under 28 U.S.C. §1332(a) was proper. In its opinion, the panel majority focused only on the diversity jurisdiction issue and, concluding that the District Court had erred in dismissing the case, did not reach the remaining grounds for federal jurisdiction.

In a dissenting opinion, Judge Vance concluded that "a party cannot unilaterally confer subject matter jurisdiction on a federal court by declaring who is to represent the trust in legal actions."

It is respectfully submitted that the opinion of the majority of the Court of Appeals in this cause is in direct conflict with the reasoning of the Supreme Court in *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) and *Morrissey v. Commissioner of Internal Revenue*, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935). This is a

[2]The other grounds alleged were the Securities Act of 1934; class action under Rule 23.2 of the Federal Rules of Civil Procedure; and Federal Bankruptcy Act jurisdiction, FMI having become a debtor-in-possession subsequent to the filing of the Original Complaint. The District Judge determined that the claim under the 1934 Act was frivolous; that the class action procedure was unavailable; and that Navarro had not consented to Bankruptcy Act jurisdiction.

case of first impression in this Court, and the Court of Appeal's decision clearly overrules or conflicts with the decisions of the district courts of several Circuits in *Larwin Mortgage Investors v. River Drive Mall, Inc.*, 392 F. Supp. 97 (S.D. Tex. 1975); *Jim Walter Investors v. Empire-Madison, Inc.*, 41 F. Supp. 425 (N.D. Ga. 1975); *Chase Manhattan Mortgage & Realty Trust v. Pendley*, 405 F. Supp. 593 (N.D. Ga. 1975); *Lincoln Associates, Inc. v. Great American Mortgage Investors*, 415 F. Supp. 351 (N.D. Tex. 1976); *Carey v. U.S. Industries, Inc.*, 414 F. Supp. 794 (N.D. Ill. 1976); *Heck v. A. P. Ross Enterprises, Inc.*, 414 F. Supp. 971 (N.D. Ill. 1976); *Independence Mortgage Trust v. White*, 446 F. Supp. 120 (D. Ore. 1978); *National City Bank v. Fidelco Growth Investors*, 446 F. Supp. 124 (E.D. Pa. 1978).

So far as is known to counsel for Navarro, the only decisions of other Circuits directly concerning this issue are *Riverside Memorial Mausoleum v. UMET Trust*, 581 F.2d 62 (3rd Cir. 1978) and *Belle View Apartments v. Realty ReFund Trust*, 602 F.2d 668 (4th Cir. 1979) in both of which the Courts denied diversity jurisdiction.[3] Accordingly, the decision of the Court of Appeals in the instant case is contrary to all prior cases in which

[3]But see *First Florida Building Corporation v. Smith*, 599 F.2d 447 (5th Cir. 1979) (an unpublished opinion of the Fifth Circuit summarily reversing an order of dismissal, on the authority of the panel majority's opinion in the instant case); *Willowood Condominium Ass'n, Inc. v. HNC Realty Co.*, 531 F.2d 1249 (5th Cir. 1976) wherein the Court observed in passing that the case was "properly grounded in diversity jurisdiction"; and *In Re Vento Development Corp.*, 560 F.2d 2 (1st Cir. 1977) which case apparently the Fifth Circuit considered distinguishable for it is not cited in the majority opinion in this case.

the issue of citizenship of an unincorporated business association has been directly presented. Most importantly, the holding of the Court of Appeals majority in this cause is, as observed by its dissent, a judicial extension of diversity jurisdiction contrary to the mandate of this Court in *Bouligny* that such extensions are exclusively within the legislative domain.

B. Factual Background

The Trustees' "First Amended Original Complaint" (A. 3-31; hereinafter referred to as the "Complaint") alleges:

> "The above-named Plaintiffs, Trustees of Fidelity Mortgage Investors, a Massachussetts business trust (hereinafter "FMI" or "Plaintiff") complain of Defendant Navarro Savings Association as follows. The above-named Plaintiffs are individuals, all of whom are residents and citizens of states other than the State of Texas. They bring this action in their capacity as Trustees of FMI . . ." (A. 3).

The Trustees assert that it is they, and they alone, who are individuals exclusively empowered to prosecute the instant cause of action. While the Declaration of Trust (A. 40-89) purports to convey to the Trustees and their respective successors in office, the power:

> "To collect, sue for and receive all sums of money coming due to the Trust, and to prosecute, join, defend, compromise, abandon or adjust, any actions, suits, claims, demands or other litigation relating to the Trust, the Trust Estate or the Trust's affairs." (A. 54);

The Declaration further provides:

> "A Trustee may be removed with or without cause

by the vote of a majority of the outstanding Shares or with cause by vote of a majority of the Trustees. Upon the resignation or removal of any Trustee, he shall execute and deliver such documents and render such accounting as the remaining Trustees shall require and shall thereupon be discharged as Trustee." (A. 47).

Neither the resignation, death or removal of any Trustee (A. 47-48) nor the death or incapacity of any Shareholder (A. 64) affects the continuation of the Trust. Shares are freely transferrable as personal property (A. 63-64).

Further, the Declaration of Trust provides:

"Upon the resignation, removal or death of a Trustee he (and in the event of his death, his estate) shall automatically cease to have any right, title or interest in or to any of the Trust Estate, and the right, title and interest of such Trustee in and to the Trust Estate shall vest automatically in the remaining Trustees without any further act." (A. 48).

The Declaration of Trust requires the affirmative vote of a majority of the outstanding shares of the Trust to approve the sale or other disposition of assets comprising more than 50% of the Trust Estate (A. 67).

In Article VII of the Declaration of Trust, it is provided that the Trustees may not be held personally liable for any act or omission in tort, contract or otherwise in connection with the affairs of the Trust, except that arising from willful misfeasance, gross negligence or the like (A. 70). Similarly, the Trustees, officers of the Trust and shareholders may not be subjected to personal liability for any debt, claim or judgment "against or with respect to the Trust, arising

out of any action taken or omitted for or on behalf of the Trust and the Trust shall be solely liable therefor and resort shall be had solely to the Trust Estate for the payment or performance thereof" (A. 70-71).

The Declaration of Trust expressly deems its creation to be a "Massachusetts business trust" and directs that to the extent permitted, the duties and liabilities of its Trustees are the same as the officers and directors of a corporation (A. 77).

Termination of the Trust may be effected by the affirmative vote of the majority of outstanding shares (A. 79) and amendment of the Declaration may be accomplished in like fashion (A. 80).

Comparison of paragraph 2.2 of the Declaration of Trust with its paragraph 2.4 indicates that while the resignation or removal of any Trustee may occasion his being required to "execute and deliver such documents and render such accounting as the remaining Trustees shall require" (A. 47), such would appear to be superfluous because "the right, title and interest of the Trustees in and to the Trust Estate shall vest automatically in all persons who may hereafter become Trustees upon their due election or appointment and qualification *without any further act*, . . ." (A. 48). Indeed, under paragraph 3.2(u) the Trustees have the power:

"To cause legal title to the Trust Estate to be held in the name of the Trustees or, except as prohibited by law, in the name of the Trust or one or more of the Trustees or any Person or nominee designated by the Trustees, on such terms, in such manner, with such powers as the Trustees shall determine and with or without disclosure that the Trust or the Trustees are interested therein." (A. 54)

Under paragraph 4.1 of the Declaration, the Trustees are invested with the authority to delegate all of their powers to a manager "without regard to whether such authority is normally granted or delegated by trustees" (A. 56).

The Trustees have alleged that none of them, as individuals, are residents of the State of Texas (A. 3); however, it has been expressly stipulated that 'there were at the time of filing of the Complaint and continue to be beneficial shareholders who are residents of the State of Texas (A. 37).

Additional facts are set forth, infra, in the Argument and Authorities portion of this Brief.

ARGUMENT AND AUTHORITIES

ISSUE: WHETHER THE CITIZENSHIP OF AN UNINCORPORATED BUSINESS ASSOCIATION–A "REAL ESTATE INVESTMENT TRUST"–FOR THE PURPOSES OF THE DIVERSITY JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES, IS THAT OF EACH OF ITS SHAREHOLDERS.

SUMMARY OF THE ARGUMENT

The Court of Appeals reached its result by application of Rule 17(a), F.R.C.P., to determine that the Trustees were the "real parties in interest" to whose residence the courts must look for the purpose of determining diversity jurisdiction. This approach is deficient in several respects: *First*, it is expressly contrary to Rule 82, F.R.C.P., and its constitutional

underpinnings which prohibit the utilization of the federal rules to expand or contract jurisdiction; *second*, the application in this case is based upon incorrect factual premises; and *third*, the "case-by-case" analysis which this approach compels (as conceded by the Court of Appeals) creates an enormous potential for inconsistency as well as for manipulation by litigants.

In any event, it has long been held by this Court that for diversity purposes, the "real parties in interest" of any collective entity conducting business on an on-going basis are the several owners. This rule has been applied, uniformly, to corporations (perhaps the most extreme case), joint stock companies, unincorporated associations, and to both general and limited partnerships. In so holding, this Court has refused to consider as controlling, the intricate and often artificial distinctions in form of ownership, operation or control frequently engendered by tax considerations or the necessity to conform to the idiosyncracies of local law.

In *Marshall v. Baltimore & Ohio. R.R.*, 157 U.S. (16 Howard) 314, 14 L.Ed. 453 (1853), the Court adhered to the foregoing rule, but adopted a fiction by which it would be presumed that the residence of the shareholders of a corporation (the "real parties in interest") was the place of incorporation. This fiction persisted until 1958, when Congress mandated that, for diversity purposes, a corporation is a citizen of the state of its incorporation and of the location of its principal office.

Following *Marshall* came a series of cases, e.g., *Chapman v. Barney*, 129 U.S. 677, 9 S.Ct. 426, 32 L.Ed. 800 (1889), and *Great Southern Fireproof Hotel Co. v. Jones*, 177 U.S. 449, 20 S.Ct. 690, 44 L.Ed. 842

(1900), wherein the Court was asked, but expressly refused to extend the residence fiction to any other collective entity. The last such effort was in *United Steelworkers v. Bouligny*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965), in which case the Court refused to apply the fiction to a labor union (an unincorporated association) and observed that such fictions were tantamount to an expansion of diversity jurisdiction–a matter resting in the discretion of Congress alone.

Without repudiating *Bouligny*, the courts cannot create a new fiction to accommodate the Trustees in this case. If the underlying premise of *Marshall*–that the shareholders are the real parties in interest–remains vital, the Court of Appeals' attempt at accommodation is clearly contrary thereto and cannot stand. There appears to be no good reason to conclude, as the Court of Appeals apparently did, that the shareholders of FMI are somehow *not* the real parties in interest, whereas the shareholders of a corporation *are*. This is particularly true where, as here, the factual premises do not compel the conclusion reached, and the distinction-making process itself carries with it the problem potential alluded to above.

This Court should therefore conclude, as did Circuit Judge Vance in his dissent, that the holding of the Court of Appeals majority is but an effort to expand diversity jurisdiction, inherently creating as many problems as it solves, and in any event an effort which is expressly precluded by the federal rules and the holding of this Court in *Bouligny*.

POINTS OF ARGUMENT

A real estate investment trust is an unincorporated business association rather than an express trust; accordingly, the residence of each of its shareholder beneficiaries is determinative upon the issue of citizenship for diversity purposes pursuant to 28 U.S.C. §1332(a).

Fidelity Mortgage Investors ("FMI") is a profit-oriented "business trust," whose principal occupation is the investment of the trust assets in mortgage loans on real property. According to the Declaration of Trust which created FMI, apparently much of the day-to-day business of the trust is managed by its Board of Trustees, while the shareholder beneficiaries have the authority to elect and remove trustees and to approve any sale or other disposition of assets comprising 50% or more of the trust estate. Admittedly, FMI has many of the attributes of an incorporated entity such as a centralized management, transferability of shares, continuity of business, etc. Were FMI a corporation and considering its principal place of business to be without the State of Texas, it is clear that diversity of citizenship would exist with the Texas Defendant, Navarro Savings Association.[4] However, both here and in the courts below[5] the Trustees have disclaimed any theory of corporate enterprise choosing instead to rely on the theory that the Trustees, through their powers under the Declaration of Trust, are the "true parties in interest" as such term is defined in Rule 17 of the

[4] 12 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure §3630 at 836 (1975).

[5] Memorandum Opinion and Order of Judge Taylor at footnote 1; Appellants' Brief in the Court of Appeals at page 5.

Federal Rules of Civil Procedure.[6]

Relying upon the case of *Larwin Mortgage Invest-*

[6]The argument urged by the Trustees and apparently accepted by the Court of Appeals that "traditional analysis" should be applied in this case, to determine the "real parties in interest," is based upon several cases which are, on their facts, distinguishable from this case. Thus, in each of *Susquehanna & Wyoming Valley R.R. & Coal Co. v. Blatchford*, 78 U.S. (11 Wall.) 1972, 20 L.Ed. 1979 (1870); *Dodge v. Tulleys*, 144 U.S. 451, 12 S.Ct. 728, 36 L.Ed. 501 (1892); and *Bullard v. City of Cisco*, 290 U.S. 179, 54 S.Ct. 177, 78 L.Ed. 254 (1933), the Supreme Court was concerned with express trusts created for the purpose of securing payment of mortgages on real property or, as in *Cisco*, coupon bonds issued by a municipality. In no instance was the trusteeship created for the purpose of operating an on-going business with the attendant features of transferrable shares, continuity of interest, purchase, replacement and sale of assets, sharing of profits, etc. While in each case, the trustees involved were invested with varying degrees of authority, their powers were always tied ultimately to some specific res or indenture transaction. As the Court determined in *Morrissey, supra*, the superficial indicia common to both entities, such as vesting the trustee with legal title to the assets, is not controlling. Rather it is the purpose for which the trusteeship is created which controls. *Fidelco, supra*, 446 F. Supp. at 127, n.3.

The cases of *Curb and Gutter Dist. No. 37 v. Parrish*, 110 F.2d 902 (8th Cir. 1940); and *Allen-West Commission Co. v. Brashear* 176F. 119 (Cir. Ct. E.D. Ark. 1910), cited by the Trustees involved similar facts. *Parrish* involved the trustee in a municipal bond situation; *Allen-West* involved a real estate deed of trust. The precedental value of *Dodge v. Tulleys, supra*, and *Houston Oil Company v. Village Mills Co.*, 241 S.W. 122 (Tex. Comm. App. 1922, holding approved) are further diminished by the fact that in those cases, the representative parties were also the true parties in interest and all being before the Court, the question of lack of jurisdiction was insignificant. See *Des Moines Navigation and R.R. Co. v. Iowa Homestead Company*, 123 U.S. 552, 8 S.Ct. 217, 31 L.Ed. 212 (1887).

ments v. Riverdrive Mall, Inc., 392 F. Supp. 97 (S.D. Tex. 1975) and other cases which are discussed infra, the District Court concluded that the citizenship of FMI was properly determined with reference to the residence of each of its beneficial shareholders. In that the Trustees failed to sustain their burden to plead and prove[7] the absence of any Texas shareholders in FMI (and, in fact, stipulated their existence), the presence of whom would destroy the complete diversity requirement of 28 U.S.C. §1332(a), diversity jurisdiction was lacking.[8]

In *Larwin*, the court considered the precise issues presented in this case. Larwin Mortgage Investments was a California real estate investment trust which advanced funds for interim financing of a construction project in Laredo, Texas. The shares of beneficial interest were publicly held by several thousand shareholders and traded on the New York Stock Exchange. The declaration of trust establishing Larwin provided that:

> "While legal title to the trust assets rests exclusively in the trustees, the shareholders (holders of beneficial interest) are empowered to remove trustees, with or without cause, and fill trustee vacancies. Additionally, shareholders' consent must be obtained before the consummation of any transaction which involves the disposition of more than 50% of the trust estate." [Footnotes

[7]*Ray v. Bird and Son*, 519 F.2d 1081 (5th Cir. 1975).

[8]*Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); *Shainwald v. Lewis*, 108 U.S. 158, 2 S.Ct. 385, 27 L.Ed. 691 (1883); *Mas v. Perry*, 489 F.2d 1396, reh. den. 492 F.2d 1242 (5th Cir. 1974), cert. den., 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed.2d 70.

omitted] 392 F. Supp. at 100.

The Court considered Larwin's two contentions: (i) that it was a juridical entity in and of itself, whose citizenship was California; and (ii) alternatively, that as an active trust, only the residence of its trustees should be considered for diversity purposes. 392 F. Supp. at 98.

The district judge in *Larwin*, as did the district judge in this case, determined that the decision of the United States Supreme Court in *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) precluded extension of the "corporate citizenship" fiction to unincorporated associations for diversity purposes.[9] The Court then determined that the characteristics of Larwin as a business organization—particularly the rights of the beneficial interest holders to approve certain transactions and to elect or remove the manager-trustees—predominated over its outward appearance as a "conventional" trust. The Court analogized to the question before the United States Supreme Court in *Morrissey v. Commissioner*, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935) where it was observed that:

> "The object [of the business trust] is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of business and

[9]See also *Baer v. United Services Automobile Association*, 503 F.2d 393 (2nd Cir. 1974); *Fox v. Prudent Resources Trust*, 382 F. Supp. 81 (E.D. Pa. 1974); *Lowry v. International Brotherhood of Boilermakers*, 259 F.2d 568 (5th Cir. 1958); 13 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 3630 at 848 (1975).

> sharing its gains." 296 U.S. at 357, 56 S.Ct. at 295.

Concluding that the Trustees were therefore not the "real parties in interest" (as they would be in the case of a conventional trust) the court dismissed Larwin's alternative contention.

In *National City Bank v. Fidelco Growth Investors*, 446 F. Supp. 124 (E.D. Pa. 1978) the district judge reviewed all the relevant authorities and concluded that the reasoning applied in *Larwin, supra*, was appropriate. In *Fidelco*, the REIT was the defendant in a diversity-based suit and was, in fact, the party alleging the lack of jurisdiction. Recognizing "the significant difference between the business trust and the conventional trust-differences both in purpose and structure . . ." the court concluded that the REIT could not be treated as a conventional trust and must therefore be treated as an unincorporated association. 446 F. Supp. at 128.

In *Fidelco*, the plaintiffs emphasized the degree of control exercised by the trustees over the business and assets of the REIT. The Court observed:

> "This, [plaintiffs] contend, makes Fidelco a conventional trust, rather than an unincorporated association such as a partnership. I cannot agree. True, under the general rule, the degree of control vested in the trustees largely determines whether an entity will be treated as trust or partnership *when personal liability is sought to be imposed on the shareholders.* See, e.g., *Hecht v. Malley, supra*, 265 U.S. at 147, 44 S.Ct. 462 (discussing Mass. decisions); 16A W. Fletcher, *Cyclopedia of the Law of Private Corporations*, §8230 at 554-55, 8261 (1962 & Supp. 1977). The issue in this case

> is entirely different. It is whether a business trust sufficiently resembles a conventional trust to be accorded like treatment in the determination of its citizenship for diversity purposes. Thus, as was the case with Fidelco's REIT status, the control vested in the trustees does not, without more, require that Fidelco be treated as a trust. Nor does Fidelco's REIT status, when taken together with the trustee's extensive control over its affairs, require that Fidelco be viewed as a trust. Both characteristics evidence some similarities between Fidelco and the conventional trust, but in my view, this similarity is largely offset by the several dissimilarities referred to earlier." 446 F. Supp. at 129.

That *Larwin* and *Fidelco* deal squarely with the issue presented here cannot be denied. That every other reported decision has followed the rationale of *Larwin* is likewise indisputable. See, e.g., *Riverside Memorial Mausoleum v. UMET Trust*, 581 F.2d 62 (3rd Cir. 1978); *Belle View Apartments v. Realty ReFund Trust*, 602 F.2d 668 (4th Cir. 1979); *Jim Walter Investors v. Empire-Madison, Inc.*, 401 F. Supp. 425 (N.D. Ga. 1975); *Chase Manhattan Mortgage and Realty Trust v. Pendley*, 405 F. Supp. 593 (N.D. Ga. 1975); *Lincoln Associates, Inc. v. Great American Mortgage Investors*, 415 F. Supp. 351 (N.D. Tex. 1976); *Carey v. U.S. Industries, Inc.*, 414 F. Supp. 794 (N.D. Ill. 1976); *Heck v. A. P. Ross Enterprises, Inc.*, 414 F. Supp. 971 (N.D. Ill. 1976); *Independence Mortgage Trust v. White*, 446 F. Supp. 120 (D. Ore. 1978).

In each of those cases the same arguments advanced here were rejected with the observations that "Pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be

made to the Congress and not to the Court," *Bouligny, supra*, 382 U.S. 145, 150-151, 86 S.Ct. 272, 275; and that "to rule otherwise would render the decisions relied upon above a nullity and allow federal jurisdiction to be created at the will of the litigants." *Chase Manhattan, supra*, 405 F. Supp. 593, 595.

The theory that the Trustees are the real parties in interest as that term is defined in Rule 17(a) F.R.Civ.P. is incorrect. In the *Chase Manhattan* case, supra, the Court rejected this argument for two reasons: first, that each of the prior decisions to the effect that citizenship of the shareholders is controlling implicitly presumes that they are the real parties in interest; and second, the substantive State law granting the trustees capacity to sue in their own names does not bestow diversity jurisdiction. Each of the District Court decisions cited above are in accord with this construction.

Under the holding of the panel majority in this case, the beneficial interest holders of a real estate investment trust may create or destroy diversity jurisdiction through the simple device of removal or appointment of a trustee having a residence which, when compared to the opposing party, suits the REIT's purpose. Navarro urges that this goes beyond the intent of Congress and conflicts with the *Bouligny* case, *supra.*

The opinion of the Court of Appeals majority in this case holds that Rule 17(a) is correctly applied in the facts of this case. However, it is respectfully submitted that Rule 17(a) does not comprehend the "business trust" as distinguished from the conventional trust. In analyzing why the Rule is inapplicable, it is perhaps appropriate to use as a point of departure, the evolutionary changes in the jural status of corporations.

In the Fourth Circuit's opinion in the *Bouligny* case[10] Judge Bell traced these changes beginning with *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 3 L.Ed. 38 (1809) where the principle was set forth that the corporation is "a mere creature of the law, invisible, intangible and incorporeal." The Supreme Court upheld the doctrine that the courts of the United States had not been invested by Congress with the authority to look to the corporate name to the exclusion of the citizenship of its stockholders, notwithstanding the fact that the corporation could sue and be sued in its own name.

The Supreme Court apparently reversed itself in the case of *Louisville C. & C.R.R. v. Letson*, 43 U.S. (2 Howard) 497, 11 L.Ed. 353 (1844) holding that the consequences and inferences drawn from the reasoning in the cases of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 277 (1806) and *Bank v. Deveaux, supra* "were carried too far." Reviewing the attributes of a corporation, the Supreme Court observed:

> "We confess our inability to reconcile these qualities of a corporation–residence, habitancy, and individuality, with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the Courts of the United States, unless in consequence of a residence of all of the corporators being of the State in which the suit is brought. When the corporation exercises its powers in the State which chartered it, that is its residence, and such an averment is sufficient to give the Circuit Court jurisdiction." 43 U.S. at 559; 11 L.Ed. at 378.

[10]*R. H. Bouligny, Inc. v. United Steel Workers of America*, 336 F.2d 160 (4th Cir. 1964).

Finally, in *Marshall v. Baltimore and Ohio R.R.*, 57 U.S. (16 Howard) 314, 14 L.Ed. 953 (1853) the Supreme Court, held that there would be made the "presumption arising from the habitat of a corporation in the place of creation [as] being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it." 57 U.S. at 329; 14 L.Ed. at 326.

The *result* (although not the rationale) accomplished through the fiction created by *Marshall v. Baltimore and Ohio R.R., supra*, was codified by the 1958 amendments to 28 U.S.C. §1332, where Congress declared that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." The significant factor is that Congressional action was required to achieve the particular result sought, i.e., a broad but uniform policy for treatment of chartered corporations for diversity purposes. The 1958 amendment thus displaced the "legal fiction" achieved in *Marshall v. Baltimore and Ohio R.R.*, but did not serve to alter the original premise from which the fiction arose.

Viewed in this context, there becomes discernible a pattern of treatment for diversity purposes, of the various types of non-incorporated associations of individuals collectively joined under a common name. *Chapman v. Barney*, 129 U.S. 677, 9 S.Ct. 426, 32 L.Ed. 800 (1889) thus represents the Supreme Court's refusal to extend the legal fiction of *Marshall*–or to create a new device–in the case of a joint stock company. The Court observed:

> "But the express company cannot be a *citizen* of

> New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is *not* a corporation, but a joint stock company—that is, a mere partnership. And, although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a federal court." [Emphasis by the Court] 129 U.S. at 682; 32 L.Ed. at 801-02.

In *Great Southern Fireproof Hotel Company v. Jones*, 177 U.S. 449, 20 S.Ct. 690, 44 L.Ed. 842 (1900) the Supreme Court again refused to extend the presumptive citizenship device, this time in the case of limited partnerships, the Court stating:

> "But the capacity to sue and be sued by the name of the association does not make the plaintiffs a corporation within the rule that a suit by or against a corporation in its corporate name in a court of the United States is conclusively presumed to be one by or against citizens of the State creating the corporation [citations omitted]. The rule that for purposes of jurisdiction and within the meaning of the clause of the Constitution extending the judicial powers of the United States to controversies between citizens of different states, a corporation was deemed a citizen of the state creating it, has been so long recognized and applied that it is not now to be questioned. No such rule, however, has been applied to partnership associations although such associations may have some of the characteristics of a corporation. When the question relates to the jurisdiction of a Circuit Court of the United States

> as resting on the diverse citizenship of the parties, we must look in the case of a suit by or against a partnership association to the citizenship of the several persons composing such association.
>
> * * *
>
> That a limited partnership association created under the Pennsylvania statute may be described as a 'quasi corporation,' having some of the characteristics of a corporation, or as a 'new artificial person,' is not a sufficient reason for regarding it as a corporation within the jurisdictional rule heretofore adverted to. *That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations.*" 177 U.S. at 456-57; 44 L.Ed. at 845. [Emphasis added.]

In the case of *Thomas v. Ohio State University Trustees*, 195 U.S. 207, 25 S.Ct. 24, 49 L.Ed. 160 (1904) the Supreme Court refused to extend, on the averments contained in the bill, collective citizenship to the Board of Trustees of a State university. The argument that the legislative act creating the Board sufficiently endowed that body with the characteristics of a corporation so as to bring it within the rule in the *Marshall* case was rejected. In answering the questions certified by the Circuit Court, the Supreme Court concluded that the Board was neither a corporation nor did the bill aver facts which constituted it as such. The Court concluded that the Ohio law did sufficiently invest the Board with the juridical status to sue and be sued in the collective name "without bringing the several persons constituting the Board before the Court as defendants, provided the bill had contained the additional allegation that each individual Trustee was a citizen of Ohio." 195 U.S. at 218; 49 L.Ed. at 167.

The decision of the Supreme Court in *Bouligny* is in

harmony with these antecedents and represents a predictable refusal to extend the doctrine to another species of unincorporated association. Rather, the Court there deferred to Congress to create, by statutory enactment, such presumptions as deemed proper as a policy matter. It would therefore seem wholly inconsistent that the Supreme Court, in promulgating Rule 17 of the Federal Rules of Civil Procedure, would disregard the principle so carefully enunciated in the foregoing cases.

It is, of course, the declared policy of the Federal Rules that such Rules "shall not be construed to extend or limit the jurisdiction of the United States District Courts," Rule 82 F.R.C.P. Thus Rule 17(a) cannot expand or contract the District Court's diversity jurisdiction, that being a matter reserved, under the Constitution, to Congress alone. It follows that analysis of this case in terms of, or by analogy to, "real party in interest" concepts is not particularly useful. Indeed, this case presents but another effort to create a legal fiction in order to confer diversity jurisdiction—a judicial exercise which has been expressly foreclosed by *Bouligny* and its antecedents.

The majority opinion of the Court of Appeals in the case at bar, cites with approval the decision of the Second Circuit in *Colonial Realty Corporation v. Bache & Co.*, 358 F.2d 178 (2nd Cir. 1966), *cert. denied*, 385 U.S. 817, 87 S.Ct. 40, 17 L.Ed.2d 56 (1966). There it was held that in a diversity-based suit against a limited partnership, the district court need concern itself only with the residence of the general partners and not that of the limited partners. The Court in *Colonial Realty* offers little exposition of the basis for its decision and,

notwithstanding this Court's refusal to review that case, it is respectfully submitted that the result was completely at variance with the applicable precedents. The Third Circuit criticized and refused to follow the anomalous result reached in *Colonial Realty* in the case of *Carlsberg Resources Corporation v. Cambria Savings & Loan Association*, 554 F.2d 1254 (3rd Cir. 1977). The Court there observed:

> "In the first place, we are troubled by the readiness with which *Colonial Realty* engrafts capacity-to-sue rules to the traditional requirements of diversity jurisdiction. As we view it, jurisdiction is the *most* elemental concern of the federal courts in evaluating the cases which come before them. By contrast, issues pertaining to the capacity to sue, while hardly lacking in significance, are deserving of consideration only after the jurisdiction of the federal court has been firmly established. It may be for this reason that the Supreme Court has, in the leading cases concerning partnerships and other nonincorporated associations, declined to view problems involving diversity jurisdiction through the perspective of capacity to sue." [Footnote omitted] 554 F.2d at 1260.

The *Carlsberg* court observed that Rule 17 F.R.C.P. was not authority to refer the district courts to the law of the forum state to determine federal diversity jurisdiction, a procedure contrary to the overriding considerations of Rule 82. The court stated:

> "To import state law concepts of capacity to sue into evaluations of jurisdiction, explicitly or implicity under Rule 17, would appear to have a definite effect on jurisdiction. Specifically, to ignore an identity of citizenship between limited partners and litigants with opposing interests,

because of reliance on state statutes concerning the capacity to sue, does operate to liberalize access to the federal courts under diversity jurisdiction. It would seem to follow that Rule 82 bars the utilization of Rule 17 in this context.

* * *

One ramification of the *Colonial Realty* approach is to empower state legislators or state courts to determine the perimeters of federal jurisdiction.

* * *

In our view, it would not be advisable to adopt the *Colonial Realty* rule. For to do so seemingly, would make diversity jurisdiction, in situations such as the one at hand, largely dependent upon the vagaries of state law. Also troubling would be the prospect of disparate treatment of litigants whose ability to vindicate their interests in federal court, under the diversity provisions, would be equally dependent upon state law. Availability of diversity jurisdiction, we believe, ordinarily *should not rest upon considerations of state law but rather upon uniform and readily cognizable principles of general application.*" 554 F.2d at 1261. [Emphasis added.]

If the rule as enunciated in *Carlsberg* is correctly applied in the case of limited partnerships, it is difficult to perceive any reason why it should be differently applied in the case of the REIT. Both entities are unincorporated associations formed for the purpose of carrying on a business enterprise and both are composed in whole or at least in part of individual equitable interest holders whose liability vis-a-vis third parties is limited to their respective undivided interests in the collectively owned assets. That both types of associations may, from time to time, bear other similarities, e.g., transferability of interests, delegated

management, continuity of business irrespective of the death or resignation of a member, merely confirms that these entities are properly treated as indistinguishable for federal diversity purposes.

The Court of Appeals cited with approval the Comment, *Limited Partnerships and Federal Diversity Jurisdiction*, 45 U.Chi. L.Rev. 384. The author of that article, in concluding that the rule of *Colonial Realty* is the correct one, based his conclusion on the premise that "a jurisdictional test that looks to the real parties to the controversy not only makes sense of the diversity precedents, but also accords well with the protective policies underlying the diversity jurisdiction, a policy which remains vital today." 45 U.Chi.L.Rev. at 417-18.

This proposed approach confuses the procedural requirements of Rule 17 with substantive law requirements, contravening the express strictures of Rule 82. The commentator's assertion that "control" of the entity's business affairs (be it corporation, limited partnership or REIT) confers "real party" status on the managers is incorrectly premised. The author asserts, in a footnote quoted by the majority opinion that:

> "Trust Agreement terms that permit the beneficiaries to remove the trustees or to prevent transfers of trust property do not seem to vest the management of the trust in the beneficiaries; such provisions only give beneficiaries certain powers that corporate shareholders commonly wield." See 597 F.2d at 427, footnote 6.

This analysis ignores the obvious fact that in either form of business enterprise, the ultimate power of management resides in those individuals holding a sufficient percentage of ownership to remove the

managers whether they be directors, officers, general partners or trustees. Moreover, the analysis disregards the fact that the unique treatment accorded corporations prevails only through judicial fiat and the subsequent congressional codification of that result.

In holding, in effect, that under Rule 17(a) the declaration of trust governing the association of shareholders in a Massachusetts-type business trust controls, the majority relegates the determination of federal jurisdiction to such shareholders and presumably, would permit them to create or destroy diversity as from time to time may suit their purposes. In this case, while the Trustees admittedly have a great deal of control over the day-to-day management of the business of FMI, it is still the case that the beneficial interest holders ultimately have the power of removal of the Trustees by simple majority vote, as well as the right to control disposition of the trust assets in certain circumstances.

The opinion of the Court of Appeals in this case appears to place great emphasis upon the Trustees as being a "class of membership" distinct from the overall body of shareholders. This distinction is ephemeral. The Trustees not only have the power to delegate to an appointed manager all of their powers *without regard to whether such authority is normally granted or delegated by trustees* (A. 56), but also legal title may be vested in any "person or nominee designated by the Trustees" (A. 54) without even the necessity of disclosure of such fact. These are powers, either of which standing alone, would serve to distinguish the Trustees of FMI from those of a conventional trust as contemplated by Rule 17(a). The purported distinction between these "classes

of membership" is further blurred by the fact that no Trustee or shareholder may be held *personally* liable for any action in tort, contract or otherwise "in connection with the affairs of the Trust" (A. 70). If the intention of FMI is to limit liability to the assets of the Trust Estate—as it appears is the case—then analysis of the Trust's organic composition on a "class of membership" basis is irrelevant.

It will be recalled that in *Independence Mortgage Trust v. White, supra*, the business trust was attempting to *defeat* diversity jurisdiction.[11] It is not difficult to imagine the situation where a business trust such as FMI might, in a case of sufficient importance, remove one or more Trustees and substitute others so as to create or destroy diversity jurisdiction as suits the immediate purpose.

In this case, the record is not clear as to whether all Trustees of FMI were joined as Plaintiffs since, on the Amended Complaint, some of the names which originally appeared have been dropped. Whether there are other Trustees of FMI who are citizens of the State of Texas and whether any of the Trustees are themselves beneficial interest holders in the association does not appear from the record. However, the potential for abuse is apparent. Thus, resort to the trust

[11]See also *First Florida Building Corp. v. Smith*, 599 F.2d 447 (5th Cir. 1979) and *Belle View Apts. v. Realty ReFund Trust*, 602 F.2d 668 (4th Cir. 1979). The latter case is particularly in point because initially, the REIT in that case invoked the jurisdiction of the federal court by *removal* from a state court alleging diversity in the removal petition. Subsequently, after an adverse judgment on the merits, the REIT raised the jurisdictional issue for the first time, and succeeded in obtaining a reversal.

instrument to determine the real parties in interest is of questionable value because of the transitory nature of the results and the potential for abuse.

The *Bouligny* case, is the predicate for the rationale of the *Larwin* line of decisions but is itself no more than the extension to one more class of unincorporated associations, i.e., the labor union, of the rule set forth in the case of *Chapman v. Barney*, 129 U.S. 677, 9 S.Ct. 426, 32 L.Ed. 800 (1889). As was observed by Mr. Justice Fortas, speaking for a unanimous Court:

> "In recent years courts and commentators have reflected dissatisfaction with the rule of Chapman vs. Barney. The distinction between the 'personality' and 'citizenship' of corporations and that of labor unions *and other unincorporated associations*, it is increasingly argued, has become artificial and unreal. The mere fact that a corporation is endowed with a birth certificate is, they say, of no consequence. In truth and in fact, they point out, many voluntary associations and labor unions are indistinguishable from corporations in terms of the reality of function and structure, and to say that the latter are juridical persons and 'citizens' and the former are not is to base a distinction upon an inadequate and irrelevant difference." 382 U.S. at 142-150; 15 L.Ed.2d at 219-20 (emphasis added).

The Court then sets out the arguments for disregarding the distinctions between the corporation and its unincorporated counterpart and concludes with the now-familiar observation that "pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts." 382 at 150-51; 15 L.Ed.2d at 220.

The Court further pointed out the difficulties which would ensue if the Court sought to formulate some general principle for ascertaining of which state such labor union is a citizen. The same difficulties may be easily envisioned as to other species of unincorporated associations, not the least of which is the real estate investment trust.

For example, the Declaration of Trust creating FMI appears to have been executed and recorded at Boston, Massachussetts (A. 89); however, the association's secretary, Arthur W. Milam, resides at Jacksonville, Florida (A. 78) which city and State appear to be the true "nerve center" of FMI as evidenced by the residence of FMI's investment advisors (A. 29). This is perhaps not conclusive because FMI's Debtor in Possession proceedings in the United States Bankruptcy Court were apparently filed in the Southern District of New York (A. 38) where under Bankruptcy Rules, it must have resided or conducted a significant portion of its business. The record is far from conclusive on this point but it is clear that so far as the "entity" concept is concerned, there is more than one likely candidate for the domicile of an unincorporated association such as FMI.

The inquiry is confused all the more by reason of the Trustees' abandonment of the entity concept and insistence upon the residence of the Trustees as being the controlling factor (A. 3). The potential for abuse of this device has already been noted. Moreover, application of the rule of *Chapman* and *Bouligny* to *any* unincorporated association has to commend it its simplicity and ease of application. For example, in *Chapman*, the subject entity was a joint stock company.

In *Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n, supra*, 554 F.2d 1254 (3rd Cir. 1977), the rule of *Chapman* was applied to a limited partnership.

In *Carlsberg*, the Court considered the closely analogous problem and concuded that the teaching of the case of *Great Southern Fireproof Hotel Co. v. Jones*, 177 U.S. 449, 20 S.Ct. 690, 44 L.Ed. 842 (1900) is that:

> "... In dealing with partnerships, limited and otherwise, we should look to the citizenship of the partners to determine whether diversity of citizenship exists." 554 F.2d at 1258.

The Court further concluded that:

> "Implicit in the opinion in *Chapman* may be a refusal by the Supreme Court to differentiate between classes of association or partnership members regarding questions of diversity. In that case, there were in essence, two such classes—one consisting of the president, a member with capacity to sue by virtue of state law, and another comprised of all other partners in the enterprise." 554 F.2d at 1259.

The opinion of the Court of Appeals in the instant case further holds that the case of *Morrissey v. Commissioner of Internal Revenue*, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935) is inapposite. In that case, the business trust was held to be an unincorporated association for the purposes of taxation. It is respectfully suggested that the panel majority errs in holding *Morrissey* to be inapposite. The characterization of the REIT for tax purposes, while not necessarily controlling, is instructive for determining its status for other related purposes including federal court jurisdiction.

A fair reading of *Larwin* clearly militates against the conclusion that the district judge considered the tax treatment of REIT's as determinative. The Court observed: "The problem of whether Larwin should be treated, for diversity purposes, as a trust or as an unincorporated association, *appears analogous* to that before the Supreme Court in *Morrissey*..." 392 F. Supp. at 100 (emphasis added); and further stated:

> "The advantageous treatment of such publicly-held trusts under certain provisions of the Internal Revenue Code of the United States does not require the courts to treat any such trusts as a traditional trust." 392 F. Supp. at 101.

In each of the other cited cases, it is clear that the respective courts were applying the *Morrissey* reasoning by analogy only.[12] As the district judge observed in *Lincoln Associates, supra*, and reiterated in his opinion in this case:

> "The issue before the Court turns not upon an election by [the REIT] under the tax code which results in its being a 'real estate trust' rather than a 'real estate investment trust,' but rather upon the intrinsic nature and purpose of [the REIT] as a business enterprise." 415 F. Supp. at 354.

Indeed, analysis of the Supreme Court's opinion in *Morrissey*, indicates it is not mere semantics to state that this Court was concerned not with the question of the tax treatment of the trust in question, but rather

[12] *Lincoln Associates v. Great American Mortgage Investors, supra*, 415 F. Supp. at 354-55; *Jim Walter Investors v. Empire-Madison, Inc., supra*, 401 F. Supp. at 429. Apparently, in the other cited cases, the taxation aspect of REIT's was of even less weight or not a factor at all in the ultimate decision.

whether such trust, as a business enterprise, was sufficiently distinct from a traditional "trust" as to render it an "association" for any purpose including, incidentally, taxation. *Morrissey, supra*, 296 U.S. at 356-60, 56 S.Ct. at 295-96; *Fidelco, supra*, 446 F. Supp. at 127, n.3.

From the foregoing analysis of the relevant cases three important facts are clear: (i) that *Morrissey* dictates that a "business trust" organized for the purpose of conducting an on-going business, dynamic in its interests, ownership and trustee-management, is an unincorporated business association regardless of its characterization as a "trust"; (ii) that *Bouligny* requires that for diversity purposes an unincorporated association—once it is properly so characterized—has as its citizenship the residence of each of its constituent members or interest holders; and (iii) application of "real party in interest" concepts under Rule 17(a) cannot be utilized to confer diversity jurisdiction by revising or ignoring the characterization of a party compelled by (i) and (ii) above. Applying the Supreme Court decisions to REIT's, each of the District Courts have properly concluded that the large, publicly-traded REITs lack the requirement of complete diversity where there are shareholders residing in the same state as the opposing party.

The opinion of the Court of Appeals quotes at some length the provisions of the promissory note from Rockwall Estates, Inc. payable to the individual Trustees and its commitment letter allegedly issued by Navarro to Rockwall Estates, Inc. Navarro, of course, is not alleged to be a party to the promissory note transaction and in any event, Navarro believes that the

terms of a contractual instrument between a third party and the Trustees could not serve to confer diversity jurisdiction on the federal court. More importantly, neither the promissory note nor the commitment letter are material in determining the status of FMI for diversity purposes.[13]

The provisions of the Declaration of Trust referred to in the opinion of the Court of Appeals should not be considered the determinative factor of FMI's status for federal jurisdictional purposes. In the dissenting opinion, Judge Vance cites the opinion of Judge James C. Hill, then a District Judge, in the case of *Chase Manhattan Mortgage & Realty Trust v. Pendley*, 405 F. Supp. 593 (N.D. Ga. 1975):

> "Stated simply, since the business trust has the status of an unincorporated association, its citizenship will control the issue of diversity even if the plaintiff were allowed to substitute the individual trustees as the named plaintiffs. The court is of the opinion that to rule otherwise would render the decisions relied upon above a nullity and allow federal jurisdiction to be created at the will of the litigants. To say that diversity jurisdiction exists if the Trustees sue on behalf of the Trust, but does not exist if the Trust sues acting through the Trustees, is to honor form over substance and

[13]Indeed, reference to the promissory note and commitment letter may only serve to further obscure the issue. The commitment letters (A. 17-22; A. 22-28) are apparently addressed to Rockwall Estates, Inc., a Texas corporation, not made a party to this suit. The promissory note (A. 9-16) although payable to the Trustees makes repeated reference to FMI as an entity (A. 14-15). The Assignment (A. 30-31) of the commitment letter purports to assign that instrument to FMI as opposed to the Trustees.

create problems where none now exist. If the Trustees may sue and create jurisdiction, then may one trustee or two or fewer than all sue and establish jurisdiction? If the Trustees may sue on a promissory note, may they sue on all contracts? For torts? The court is reinforced in its conclusion by the tone and philsophy expressed by the United States Supreme Court in *United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) to the effect that if diversity jurisdiction is to be extended to hitherto uncovered broad categories of litigants it ought to be done by the Congress and not the courts." 405 F. Supp. at 595.

The majority's approach of determining diversity jurisdiction "on a case by case basis (there being no statutory model) to determine which class [of membership in the organization] has exclusive power to control and manage the trust" will, as pointed out by the dissenting opinion, lead to divergent results and an entire new body of jurisdictional precedents where none is necessary.

The Court's analysis limiting *Bouligny* to labor unions is illogical and not a fair reading of that case. To restrict the application of *Bouligny* to labor unions is to create a sort of "second-class citizenship" for such an association.

In summary, the opinion of the Court of Appeals in sustaining diversity jurisdiction constitutes the extension of that right to a class of litigants not heretofore contemplated by Congress and an open invitation to use artificial means to create subject matter jurisdiction which otherwise would not exist. The decision in this case overrules not only all prior decisions of the district

courts where the issue was squarely presented, but conflicts with the Third Circuit's opinion in *Riverside Memorial Mausoleum, supra*, and that of the Fourth Circuit in *Belle View Apartments v. Realty ReFund Trust, supra*, and the controlling precedents established in *Bouligny* and *Morrissey, supra.* It is respectfully submitted that the opinion of the panel majority is in error and should be reversed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Supreme Court of the United States should reverse the judgment of the Court of Appeals and affirm the district court's dismissal of this case for want of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lawrence Fischman, hereby certify that a true and correct copy of the above and foregoing Petitioner's Brief on the Merits has been hand delivered to James A. Ellis, Jr., Carrington, Coleman, Sloman, Johnson & Blumenthal, 3000 One Main Place, Dallas, Texas, attorney for Respondents.

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